(5)

No. 98-5864
A-186

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TOMMY DAVID STRICKLER,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,

Virginia Department Of Corrections,

Respondent.

On Petition For A Writ Of Certiorari To The
Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND STAY OF EXECUTION

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The petition for certiorari argued that the Fourth Circuit in this case had extended the putative "due diligence" exception to the prosecution's duty under Brady v. Maryland, 373 U.S. 83 (1963), in a manner inconsistent with the longstanding precedents of this Court, with the rulings of those Circuits that have recognized such an exception, with the established doctrine of this Court on procedural default, and with simple fairness. As a result of this extension, the Court below reached a result that left Petitioner to bear the fatal consequences of wrongdoing by the prosecutor. Unless this Court intervenes, the Fourth Circuit will continue to eviscerate two fundamental principles essential to the fair administration and review of criminal trials: (i) the prosecutor must voluntarily disclose impeachment and exculpatory material to the defense, and (ii) the state's suppression of such material constitutes cause excusing procedural default. In light of the basic issues of law and policy raised by these proceedings, Petitioner urges this Court to intervene.

Respondent has ignored the most basic obligation imposed on the prosecutor--to seek justice and not simply a conviction by any means. Berger v. United States, 295 U.S. 78, 88 (1935). Respondent never addresses the prosecutor's erroneous and misleading pretrial representation that all Brady material was contained in the prosecutor's "open file" and the state's erroneous and misleading representation in state habeas that all Brady material had been disclosed.[1] Instead Respondent has chosen to reargue factual issues that were decided against him in the district court, which factual findings were adopted by the Court of Appeals. Moreover, Respondent blatantly misstates the facts, as he has in the courts below. For example, he asserts in the opening sentence of the Opposition Brief that Strickler is guilty of rape. Not only was Strickler never charged with rape, but the prosecutor admitted at trial that there was no evidence to support the charge. The allegation is repeated solely to further prejudice this Court. This tactic is characteristic of the state's handling of this case

[1] "Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal [Brady] motion. . . Nor, when counsel in fact obtained all the information to which they were entitled under Brady, can [Strickler] show prejudice." Commonwealth's Motion To Dismiss in State Habeas (11/12/92), JA 542-543; Pet. App. F (attached).

"JA" refers to pages of the Joint Appendix filed on appeal in the Fourth Circuit.

throughout.

Respondent engaged in repeated violations of this Court's Brady doctrine during state court proceedings. In this case, as in others, the Fourth Circuit has repeatedly excused and implicitly condoned Respondent's failure to disclose Brady materials. See Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996); Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995); Stockton v. Murray, 41 F.3d 920 (1994); Epperly v. Booker, 997 F.2d 1 (4th Cir. 1993); see also, United States v. Wilson, 901 F.2d 378 (1990).

To deny review of this case -- which presents issues well worthy of this Court's consideration -- on the basis of Petitioner's alleged "defaults" would be to reward and encourage the very misconduct that Petitioner seeks to challenge.

I. The Fourth Circuit's "Due Diligence" Exception To The State's Disclosure Obligation Conflicts With The Decisions Of This Court And Every Other Circuit, And Petitioner Is Entitled To Relief.

Respondent has not addressed the substantive arguments presented by Petitioner concerning a due diligence exception to the State's obligation to disclose impeachment and exculpatory material. Thus, Petitioner will not repeat here his previous arguments in the Petition for Certiorari.

Respondent argues that the Brady claim is defaulted and, therefore, the conflict presented by Petitioner is irrelevant. Respondent is simply wrong. The Fourth Circuit applied a "due diligence" requirement under Brady as the legal standard used to assess both procedural default and cause to excuse default. The

Court reasoned as follows:

> [R]esolution of the question of whether Strickler's Brady claim is procedurally defaulted turns on whether the factual basis of Strickler's Brady claim was available to him at the time he filed his state habeas petition.

Strickler v. Pruett, Pet. App. A at 10. The availability of the Brady materials to defense counsel becomes the standard for determining default.

The Court continued in this vein:

> On state habeas, Strickler did assert an ineffective assistance of counsel claim based on counsels' failure to file a Brady motion, although it is unclear from the record what formed the factual basis for this claim. The Commonwealth opposed the motion on the basis that Strickler received all Brady material through the prosecutor's open file policy. However, Strickler did not request to examine the police files of the Harrisonburg Police Department, notwithstanding Stoltzfus' trial testimony that she was interviewed by Detective Claytor on several occasions and Virginia Supreme Court Rule 4:1(b)(5) which allows, with prior leave of court, discovery on all relevant matters that are not privileged.

Id. at 12. The Fourth Circuit accepted the district court's uncontested factual findings that the state represented in state habeas that all Brady material had been disclosed in the open file of the trial prosecutor and that the prosecutor had an open file policy. As set forth in the Petition before this Court, the police files at issue are privileged documents. Pet. at 29-20; App. E.

Nevertheless, the Fourth Circuit held that "the factual basis of Strickler's Brady claim was available to him at the time he filed his state habeas petition and, therefore, the Brady claim is procedurally default[.]" Id. at 14-15. The Court reasoned that Strickler should have made a discovery motion for which he had no

factual or legal basis and then further speculated that the evidence would have been produced. Ibid. Thus, the Court of Appeals imposed a due diligence requirement on defense counsel when determining the availability of Brady materials--whose very existence the state consistently denied--and concluded that defense counsel had procedurally defaulted the claim[2].

Having reasoned that defense counsel defaulted the claim based on a due diligence exception to Brady, the Court held that Strickler could not establish cause to excuse the default and used the same due diligence standard:

> Strickler asserts that the factual basis for his Brady claim was unavailable to him at the time he filed his state habeas petition and, therefore he has established cause for the procedural default. But, as noted above, Strickler's Brady claim was available to him in state court through the exercise of reasonable diligence. As such, he cannot establish cause based upon the unavailability of the Brady claim. See Stockton v. Murray, 41 F.3d 920, 925 (4th Cir. 1994)("Even if [the petitioner] had not actually raised or known of the claims previously, he still cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.")

Id. at 16 (emphasis added). The Fourth Circuit rejected Strickler's argument that he had demonstrated interference by the state that made compliance with the state procedural rule impracticable and that he had shown that the factual or legal basis of the claim was not reasonably available to counsel, citing McClesky v. Zant, 499 U.S. 467, 493-94 (1991). Id. at 15. Thus,

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[2] In state habeas, Strickler had moved for expert and investigative assistance to help develop his claims. He also requested an evidentiary hearing. The state successfully opposed these motions. JA 638-41. The Fourth Circuit does not address these facts when finding default.

the Fourth Circuit's decision in Strickler was based on its sweeping due diligence exception to Brady and its progeny.

Petitioner seeks review in this Court on a fundamental issue. First, whether the adoption of a "due diligence" exception is fundamentally inconsistent with this Court's Brady jurisprudence. If so, Petitioner is entitled to relief. Second, whether the exceedingly high standard imposed on defense counsel by the Fourth Circuit when assessing diligence swallows the constitutional rule requiring the prosecutor to disclose under Brady. If so, Petitioner is entitled to relief. Thus, resolution of the question is not irrelevant to Petitioner's conviction and sentence, as Respondent maintains.

II. The Courts Below Found That Petitioner Had No Knowledge Of Five Critical Brady Documents.

Respondent argues that Petitioner knew about the Stoltzfus documents in state court and, thus, has defaulted the Brady claim. However, these factual issues were resolved in Petitioner's favor below. The district court found that Ervin, who was the trial prosecutor, had no knowledge of five of the eight Stoltzfus documents contained in the Harrisonburg police file. The district court found that these five documents were never disclosed through the prosecutor's "open file" to Petitioner's defense counsel or to defense counsel for the co-defendant, Henderson. Pet. App. D at 18-19.

Strickler's counsel, Bobbitt, and Henderson's counsel, Franklin, submitted affidavits stating that none of the Stoltzfus

materials were in the prosecutor's open files that both defense attorneys reviewed in preparing their respective cases. App. D. at 17. Both Bobbitt and Franklin reviewed their cross examination of Stoltzfus, and neither used any of the Stoltzfus materials to impeach her trial testimony, further evidence of the prosecutor's failure to disclose the documents. Bobbitt Affidavit (8/19/97); Franklin Affidavit (9/5/97); Pet. App. G (attached).

The district court did not resolve the conflict concerning the remaining three documents that Ervin claimed he had at the time of trial given the clear Brady violation involving the remaining five documents, all unknown to Ervin, Bobbitt, and Franklin. These factual findings were not clearly erroneous and were accepted by the Fourth Circuit. Nevertheless, Respondent reargues this settled factual issue before this Court. Resp. Opp. at 11 n. 4. The argument must be rejected.

In addition, Respondent takes the contradictory position that although the prosecutor, Ervin, had only three Stoltzfus documents, somehow Strickler's defense counsel knew the contents of all eight documents. However, Det. Claytor had distributed his typed report on the interviews with Stoltzfus (exhibit 2) to the Rockingham prosecutor, not to Ervin, and did not recall distributing any other materials to any other party. App. D. at 18. Respondent never explains how the defense purportedly obtained police reports never disclosed to the prosecutor.

Respondent's default argument relies solely on the recollections of Strickler's co-counsel, Roberts, who had no memory

of the Stoltzfus documents. The district court found Roberts' recollection "much too vague and insufficient to create a genuine dispute" about disclosure of the Stoltzfus documents in view of all the evidence. Id. at 20. The district court reasoned:

> Roberts has failed to account for how he, unlike all the other participants in these trials, became aware of the plethora of information and impeachment material contained in the Stoltzfus documents. If Roberts was aware of the information contained in the Stoltzfus documents, one wonders why he and Bobbitt would have chosen not to use such powerful impeachment material on cross-examination to cast doubt on the credibility of Stoltzfus, a crucial witness for the Commonwealth.

Id. at 19-20. The district court's finding was not clearly erroneous.

Respondent also argues that the five undisclosed, Stoltzfus documents (exhibits 1 and 3-6) reveal no information not contained in the remaining three (exhibits 2, 7, and 8). A simple comparison of the documents themselves (R.App. at 2-20), the district court's summary of the documents (Pet. App. D at 6-11), and the summary of the Fourth Circuit refutes that claim (Pet. App. A at 13-14). Viewed collectively the Stoltzfus materials demonstrate that Stoltzfus fabricated much of the testimony she delivered at two trials, never witnessed any abduction, and perhaps was never even at the mall on the night Whitlock disappeared. Significantly, Stoltzfus was unable to identify Strickler or give any description of him or his clothing during her first police interview (exhibit 1: "Can't ID B/F, 1st W/M"). The jury never learned this damaging fact.

Both the district court and the Fourth Circuit also rejected

Respondent's assertion, offered again to this Court (Oppos. at RA 1, RA 21-22), that all the information in the eight Stoltzfus documents was contained in an interview Stoltzfus gave to an out-of-town newspaper just prior to Strickler's trial. As the district court found, and then the Court of Appeals noted, only one new fact was disclosed in that interview. App. D. at 21; App. A. at 10. Stoltzfus had contacted the victim's boyfriend and viewed photographs of the victim. The article contained "virtually none of the information contained in the Stoltzfus materials" App. D. at 21.

As the courts below concluded, Petitioner had no knowledge of the five critical documents contained in the Harrisonburg police files throughout state court proceedings. Respondent's assertions to the contrary must be rejected here as they were in the courts below.

III. The Suppressed Documents Were Material Under Brady.

The Court of Appeals held that the district court had erred in concluding that the Stoltzfus documents were material under Brady. Respondent argues here that the Court of Appeals was correct. Petitioner contends the lower court erred in applying a sufficiency of the evidence test, and its decision merits further review.

According to the Commonwealth, Stoltzfus was the only eyewitness to Whitlock's abduction and carjacking at the shopping mall. Petitioner's capital murder conviction was based on two predicate offenses--armed robbery, a valid predicate, and abduction with intent to defile, an invalid predicate. The prosecutor argued

to the jury that Stoltzfus' testimony demonstrated both predicates. The prosecutor argued that Strickler had a gun or a knife and held it against the victim as she drove from the parking lot. The prosecutor never argued to the jury, as Respondent now suggests (Oppos. at 14), that Strickler used a 69 pound rock to accomplish the armed robbery of Whitlock. Materiality must be assessed on the basis the state's case at the time of trial, not on some fanciful theory advanced years later. Kyles v. Whitley, 115 S. Ct. 1555, 1556 (1995)(materiality assessed in light of prosecution's evidence).

The Stoltzfus documents were material because their disclosure would have resulted in impeachment of Stoltzfus, the only eyewitness, and her testimony "would have been substantially reduced or destroyed." Id. at 1569. Use of the suppressed documents "could have fueled a withering cross-examination, destroying confidence in [her] story and raising a substantial implication that the prosecutor [or the police] had coached [her] to give it." Id. at 1570. Doubts about her testimony could have led to conviction for a lesser and noncapital offense.

The court charged the jury on both capital murder and first degree murder. The court set forth the elements of capital murder as follows:

> One, that the defendant killed Leanne Whitlock. And two, that the killing was willful, deliberate and premeditated and three, that the killing occurred during the commission of a robbery while the defendant was armed with a deadly weapon or occurred during the commission of abduction with intent to defile or to extort money or pecuniary benefit or was of a person during the commission of or subsequent to rape.

JA 425.

> One who is present aiding and abetting the actual killing who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death.

JA. 426 (emphasis added).

The court then set out the elements of first degree murder:

> One that Leanne Whitlock was killed. Two, that the killing was malicious. Three, the killing occurred in the commission of a robbery, rape or abduction. Four, that the defendant was a participant in the commission of this robbery, rape or abduction and five, that the defendant or another participant in the commission of this robbery, rape or abduction killed Leanne Whitlock.

JA. 427 (emphasis added).

Clearly any doubt about Strickler's role in Whitlock's murder would have resulted in acquittal of the capital murder charge and conviction of only first degree murder. A verdict on first degree murder was probable if the jurors had any doubt about whether an armed robbery occurred and whether Henderson or Strickler murdered Whitlock. The jury could find that Strickler had some role in an unarmed robbery based on his subsequent possession of the car and still acquit of capital murder. Moreover, had the Stoltzfus documents been available to defense counsel, counsel could have argued that the evidence demonstrated only that Strickler was an accessory after the fact to Henderson's murder of Whitlock. Possession of the car and credit cards proved nothing about the actual murder. Yet Respondent wrongly suggests that defense counsel would have presented the same defense even if he had been

given the Stoltzfus materials. As set forth in the Petition For Certiorari at 34, substantial evidence pointed to Henderson as the one who killed Whitlock. While Henderson fled the state, Strickler drove the stolen car around Virginia for a week and then returned to the vicinity of the murder, demonstrating an absence of guilt.

As the prosecutor recognized, Stoltzfus' testimony was critical. No other witness placed Strickler in the vicinity of Whitlock or her car during the time period when Whitlock was believed to have been at the mall. Despite widespread publicity about Whitlock's case (the probable source of Stoltzfus' information), no other witness came forward to report the very public events that Stoltzfus claimed to have seen. Likewise, no other witness saw Strickler with a knife or any other weapon before the murder. Without Stoltzfus' testimony, the jurors would have been reduced to speculation about Strickler's participation in both the armed robbery and abduction, the capital predicates.

The suppressed evidence concerning the prosecution's only "eyewitness" was material. This Court reiterated the established prejudice standard in Kyles, 115 S. Ct. at 1565:

> [F]avorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [Citing United States v. Bagley, 473 U.S. 667, 682 (1985)].

Petitioner demonstrated prejudice. The Court of Appeals erred.

IV. THE APPLICATION FOR STAY OF EXECUTION SHOULD BE GRANTED.

The issue presented in Strickler's Petition for a Writ of Certiorari satisfies the conditions for a stay of execution. There is a reasonable probability that four Members of this Court will consider the issue sufficiently meritorious for a grant of certiorari, there is a significant possibility that this Court will reverse the decision below and reinstate the district court decision, and there will be irreparable harm if the execution is not stayed. See Barefoot v. Estelle, 463 U.S. 880, 895 (1983). A stay should be granted to allow this Court to consider Strickler's petition with care in the normal course and not on the expedited schedule created by the Commonwealth's rush to execution.

CONCLUSION

The arguments in favor of review are compelling. Respondent has not challenged Petitioner's demonstration that the Circuit split concerning the existence and contours of a "due diligence" exception to the Government's Brady obligations has, as a result of the ruling below, become a chasm that threatens to swallow up significant Due Process rights. For the foregoing reasons, a petition for a writ of certiorari and the application for a stay of execution should be granted.

September 8, 1998

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CERTIFICATION

I hereby certify that two copies of the enclosed Reply Brief In Support Of Petition For A Writ Of Certiorari And Stay Of Execution were served by hand on counsel for Respondent, Pamela A. Rumpz, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219 on 9th of September, 1998.

Barbara L. Hartung